No. 82142-9

SUPREME COURT OF THE STATE OF WASHINGTON

NANCY NGUYEN WAPLES,

Petitioner,

v.

PETER H. YI, DDS and JANE DOE YI, husband and wife and their marital community, d/b/a LAKEWOOD DENTAL CLINIC and PETER H. YI, DDS, PS, a Washington Corporation

Respondents.

AMICUS CURIAE BRIEF OF WASHINGTON STATE MEDICAL ASSOCIATION AND PHYSICIANS INSURANCE A MUTUAL COMPANY

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A. Ms. Waples' Constitution-Based Challenges to RCW 7.70.100 Are Without Merit.

1. *Hunter v. North Mason High School* is neither controlling nor instructive.

Ms. Waples' equal-protection argument is, essentially, that RCW 7.70.100(1) is unconstitutional for the same reasons that the nonclaim statute, former RCW 4.96.020, challenged in *Hunter v. North Mason High School*, 85 Wn.2d 810, 539 P.2d 845 (1975), was held to be. *Hunter*, though, is distinguishable on more than one ground, and is neither controlling nor instructive.

a. Unlike RCW 7.70.100(1), the nonclaim statute at issue in *Hunter* had not been enacted along with a statement of legislative purpose.

In *Hunter*, the defendant was unable to show any stated legislative purpose that might have enabled the nonclaim statute to withstand equal-protection scrutiny. Here, by contrast, the legislature, when it enacted the notice-of-intent requirement in RCW 7.70.100(1), stated its purposes. Statutes pertaining to medical malpractice cases are part of RCW Ch. 7.70, the first section of which declares:

> The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as

> a result of health care which is provided after June 25, 1976.

RCW 7.70.010. In 2006, when the legislature enacted the amendments to RCW Ch. 7.70 that include the notice-of-intent requirement of RCW 7.70.100(1), it declared:

> ***[A]ccess to safe, affordable health care is one of the most important issues facing the citizens of Washington state*** . . . [T]he rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. ***The answers to these problems are varied and complex, requiring comprehensive solutions*** that encourage patient safety practices, increase oversight of medical malpractice insurance, and ***making the civil justice system more understandable, fair, and efficient for all the participants***.
>
> ***It is the intent of the legislature to prioritize patient safety and the prevention of medical errors above all other considerations as legal changes are made to address the problem of high malpractice insurance premiums.*** Thousands of patients are injured each year as a result of medical errors, many of which can be avoided by supporting health care providers, facilities, and carriers in their efforts to reduce the incidence of those mistakes. ***It is also the legislature's intent to provide incentives to settle cases before resorting to court***, and to provide the option of a more fair, efficient, and streamlined alternative to trials for those for whom settlement negotiations do not work. . . .

Laws of 2006, ch. 8, § 1 (emphases added).

b. The *Hunter* court took a less deferential approach to rational-basis scrutiny than this Court now applies to equal protection challenges.

Hunter was decided before this Court adopted current standards for scrutinizing statutes that are challenged on equal protection grounds. Now, a statute distinguishing between similarly situated classes will withstand challenge if it is rationally related to the achievement of a legitimate state interest. *Medina v. Public Util. Dist. No. 1*, 147 Wn.2d 303, 312-13, 53 P.3d 993 (2002); *Daggs v. City of Seattle*, 110 Wn.2d 49, 55, 750 P.2d 626 (1988). The Court avoids second-guessing the legislature; a statutory classification will pass muster under the "rational relation" test even if it is not logically consistent with its stated purpose in every respect. *Amunrud v. DSHS*, 124 Wn. App. 884, 888-89, 103 P.3d 257 (2004), *aff'd*, 158 Wn.2d 208, 143 P.3d 571 (2006), *cert. denied*, 549 U.S. 1282 (2007) (citing *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88, 75 S. Ct. 461, 99 L. Ed. 2d 563 (1955)). The Court does not determine whether the legislature chose the most effective way to achieve its goal, *Seeley v. State,* 132 Wn.2d 776, 795, 940 P.2d 604 (1997); *Washington Ass'n of Child Care Agencies v. Thompson*, 34 Wn. App. 225, 234, 660 P.2d 1124, *rev. denied*, 99 Wn.2d 1020 (1983), and allows the legislature to enact statutes based on "rational speculation"

rather than on empirical evidence, *Andersen v. King County*, 158 Wn.2d 1, 31, 138 P.3d 963 (2006).[1]

The *Hunter* court applied a kind of "rational relation" test,[2] but was less deferential to the legislature's judgment than this Court would be under its "any conceivable set of circumstances" approach, rejecting as implausible generally and under the facts in *Hunter* the justifications for nonclaim statutes that were "most often put forward." *Hunter*, 85 Wn.2d at 815-19. The *Hunter* court went on to reject in more peremptory fashion other "objectives [that] nonclaims statutes have been said to serve," including the facilitation of budget planning, hazard awareness, and settlement. *Id.* at 817. Under the Court's current approach to equal-protection analysis, it does not substitute its own judgment for that of the legislature as to how effectively a given statutory classification will serve a legitimate state interest.

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[1] There need only have been "an evil at hand for correction [which] the particular legislative measure [might have been thought to be] a rational way to correct." *Seeley*, 132 Wn.2d at 801. The Court will uphold a statutory classification against an equal protection challenge if there is "any conceivable set of facts that could provide a rational basis for the classification." *Medina*, 147 Wn.2d at 313; *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997).

[2] "Statutory classifications which substantially burden [the right of a person to be indemnified for personal injury] as to some individuals but not others are permissible under [equal protection analysis] only if they are 'reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike,'" *Hunter*, 85 Wn.2d at 814 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989 (1920)).

c. The nonclaim statute at issue in *Hunter* was different than RCW 7.70.100(1), because it required the giving of notice of claim to the government within 120 days *after injury*.

The most important distinction between this case and *Hunter* is that the nonclaim statute at issue in *Hunter* (RCW 4.96.020) imposed a substantial burden on persons injured by governmental misfeasance by requiring them to give the government notice of the claim within 120 days *after the injury*, effectively shortening the limitations period for persons with claims against the government to 120 days. RCW 7.70.100(1) does not impose a similar early-notice requirement, and it protects claimants against expiration of the limitations period during its 90-day waiting period. Ms. Waples does not explain why *Hunter* should nonetheless be taken as instructive, or why multiple other decisions since *Hunter* that have upheld other claim filing requirements that operate as conditions precedent to filing suit (without shortening the statute of limitations) against constitutional challenges should be ignored. *See, e.g., Medina*, 147 Wn.2d at 313-15; *Daggs*, 110 Wn.2d at 52-57; *Pirtle v. Spokane Pub. Sch. Dist. No.* 81, 83 Wn. App. 304, 307-09, 921 P.2d 1084 (1996), *rev. denied*, 131 Wn.2d 1014 (1991).

Moreover, the *Hunter* court found a conflict between the nonclaim statute and the legislature's waiver of the State's sovereign immunity from

tort claims.[3] After concluding that "the only function the special treatment given governmental bodies [under the nonclaim statute] seems to perform is the simple protection of the government from liability for its wrongdoing," the court noted that "[o]ur state has clearly and unequivocally abjured any desire to so insulate itself from liability . . . in its absolute waiver of sovereign immunity, which places the government on an equal footing with private parties defendant," and held that "[a]ny policy of placing roadblocks in the way of potential claimants against the state having been abandoned, we cannot uphold nonclaim statutes simply because they serve to protect the public treasury." *Hunter,* 85 Wn.2d at 817-18. Ms. Waples points to no similar conflict between RCW 7.70.100(1) and any other broad legislative policy statement.

Because Ms. Waples' reliance on *Hunter* is misplaced for the several reasons explained above, her equal-protection challenge to RCW 7.70.100(1) fails on its own terms.

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[3] The *Hunter* court, 85 Wn.2d at 818, noted the passage of Laws of 1963, ch. 159, § 2, providing that the state "shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation," and eliminating a proviso in Laws of 1961, ch. 136, § 1, that the state's consent to be sued "shall not affect any special statute relating to procedure for filing notice of claims against the state or any agency, department or officer of the state."

2. The notice of intent requirement does not deny equal protection of the law under this Court's current approach to equal-protection analysis.

A statute distinguishing between similarly situated classes will withstand challenge if it is rationally related to the achievement of a legitimate state interest. *Medina*, 147 Wn.2d at 312-13. That applies to statutes that distinguish between different classes of tort claimants. *Daggs*, 110 Wn.2d at 55.

RCW 7.70.100 relates to a legitimate state interest. It was enacted as part of a legislative package of provisions meant to promote access to safe and affordable health care to Washington citizens. As the legislature explained when (with the support of WSTLA, WSMA, and Physicians Insurance, along with many others concerned about access to health care) it enacted the 2006 health care reform bill:

> [A]ccess to safe, affordable health care is one of the most important issues facing the citizens of Washington state . . . [T]he rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants.

Laws of 2006, ch. 8, § 1. Among other things, the legislature sought "to provide incentives to settle [medical malpractice] cases before resorting to

court." *Id.* It is a legitimate state purpose to provide an incentive to settle before filing a medical negligence claim the litigation of which will tend to drive up the cost of health care. Surely WSTLA would not have joined the WSMA in supporting the 2006 legislation had it believed otherwise.

The notice of intent requirement is rationally related to the stated purposes of reducing upward pressures on the cost of health care and providing incentives to settle medical malpractice cases before resorting to court. It does not matter whether the requirement is the most effective way to achieve those goals. *Seeley,* 132 Wn.2d at 795; *Thompson*, 34 Wn. App. at 234. There need only have been "an evil at hand for correction [which] the particular legislative measure [might have been thought to be] a rational way to correct." *Seeley*, 132 Wn.2d at 801. The legislature enacted the notice-of-intent requirement based on what was at least "rational speculation" that doing so would advance the stated goals, and that is sufficient for equal-protection purposes. *Andersen*, 158 Wn.2d at 31; *see also Medina*, 147 Wn.2d at 313 (statutory classification will be upheld against equal protection challenge if there is "any conceivable set of facts that could provide a rational basis for the classification").

B. If the Supreme Court Decides to Consider Arguments that Amicus WSAJF Makes, but that Mrs. Waples Has Not Made, the Court Should Reject the WSAJF's Arguments.

1. The WSAJF's *Grant County II* argument fails on its own terms because there is no fundamental "right to a remedy".

a. This Court has wisely declined repeated invitations to find in Art. I, § 10 the guarantee of a "right to a remedy for a wrong suffered," and should hold that there is no such right in our state's constitution.

The Washington constitution "does not contain a clause that specifically declares 'open access' to the courts." C. Wiggins, B. Harnetiaux, and R. Whaley, "Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits," 22 *Gonz. L. Rev.* 193, 201 (1986/87). Nonetheless, the WSAJF and WSTLA long have advocated recognition of a constitutional right not only of "access to courts" but of a "right to a remedy for a wrong suffered." The WSAJF's amicus brief (pp. 13-16) renews that argument. WSAJF does not explain what a "right to a remedy for a wrong suffered" means except that, apparently, no laws enacted since 1889 or that might be enacted in the future could pass muster under such a right unless the law created a new cause of action or relaxed the requirements for proving liability or damages under causes of action that existed in 1889 or that have been recognized since then.

Art. I, § 10 provides that "Justice in all cases shall be administered openly, and without unnecessary delay." It has been construed to mean

that courts may not act in secret. *In re Recall Charges Against Seattle Sch. Dist. No. 1 Dir. Butler-Wall*, 162 Wn.2d 501, 508, 173 P.3d 265 (2007); *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).[4] In *In re Marriage of King*, 162 Wn.2d 378, 388-91, 174 P.3d 659 (2007), the court rejected the arguments that the petitioners made based on art. I, § 10, holding that, whatever the contours of a right of "access to courts" under art. I, § 10 might be,[5] they do not embrace the right to legal counsel at public expense in a divorce case, even when child custody is at issue and a parent lacks the means to hire a lawyer.

The most recent Supreme Court comment on the question of whether art. I, § 10 implies some type of "remedy guarantee," as well as rights of public and press access to court proceedings and filings, was made in *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 581-82, 29 P.3d 1249 (2001):

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[4] *But see Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982), noting that: "[I]t is equally clear that the public's right of access is not absolute, and may be limited to protect other interests. *Richmond Newspapers[, Inc. v. Virginia]*, 448 U.S. [555] at 580-82, [100 S. Ct. 2814, 2829-30 (1980)]; *In re Lewis*, 51 Wn.2d 193, 198-200, 316 P.2d 907 (1957) (juvenile proceedings not constitutionally required to be open); *Federated Publications, Inc. v. Kurtz, supra* [94 Wn.2d 51] at 65, [615 P.2d 440 (1980)] (pretrial hearings may be closed upon showing of some likelihood of prejudice to defendant's fair trial rights)." *See also, State v. Momah*, ___ Wn.2d ___, 217 P.3d 321, 325-27 (2009).

[5] Without citing art. I, § 10, this Court in *Putman v. Wenatchee Valley Med. Ctr.*, ___ Wn.2d ___, 216 P.3d 374, 376 (2009), held that "[t]he people have a right of access to courts; indeed, it is 'the bedrock foundation upon which rest all the people's rights and obligations," and that "[t]his right of access to courts 'includes the right of discovery authorized by the civil rules.'"

> The Association invites this court to conclude that [art. I, § 10] of the state constitution implies a right to a remedy in all cases where a plaintiff has suffered a legal injury.
>
> We have previously held that the state constitution does not contain any guaranty that there shall be a remedy through the courts for every legal injury suffered by a plaintiff. *See Shea v. Olson*, 185 Wash. 143, 160-61, 53 P.2d 615 (1936). However, the *Shea* court did not directly address article I, section 10 of the state constitution when it made this conclusion. . . . Nevertheless, we decline at this time to determine whether a right to a remedy is contained in article I, section 10 of the state constitution.
>
> We adopt the view of the Supreme Court of Oregon that "[i]t has always been considered a proper function of legislatures to limit the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest." *Josephs v. Burns*, 260 Or. 493, 503, 491 P.2d 203 (1971), *abrogated on other grounds by Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 23 P.3d 333 (2001). Similarly, the Supreme Court of Missouri has concluded that its open courts provision does not require "that a plaintiff can always go to court and obtain a judgment on the claim asserted." *Blaske[v. Smith & Entzeroth, Inc.]*, 821 S.W.2d [822,] 832 [(Mo. 1991)]. Because we recognize that the legislature has broad police power to pass laws tending to promote the public welfare, we decline at this time to determine whether article I, section 10 of the state constitution guarantees a right to a remedy.

Thus, art. I, § 10 has never been held to include a "right to a remedy."

Nor would inferring a "right to a remedy" in art. I, § 10 make sense historically. Const. art. I, § 10 was adopted at the 1889 constitutional convention. The convention delegates would have known that the constitutions of Oregon and other states had "open courts" provisions that included references to "remedy." *See* Or. Const. art. I, § 10 (adopted in

1857, effective 1859) ("No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation")[6] and the Pennsylvania Constitution of 1790 (" . . . all courts shall be open; and every man, for an injury done him in his lands, goods, person, or reputation, shall have

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[6] The Oregon Supreme Court, in *Oregonian Publ'g. Co. v. O'Leary*, 736 P.2d 173, 176 n.3 (Or. 1987), noted that:

> The probable genesis of [Oregon's "open courts" provision] was Article 40 of the Magna Carta: "*Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.*" (To no one will we sell, to no one will we deny, or delay, right or justice.) Linde, *Without "Due Process"*, 49 Or.L.Rev. 125, 138 (1970). Article 40 primarily was intended to curb King John's excessive marketing of royal writs. *See* McKechnie, *Magna Carta* 459-63 (1905). In his *Second Institute*, Lord Coke transformed this modest objective into a guarantee of equal access to justice for redress of legal wrongs. *See* Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 Or.L.Rev. 35, 38-39 (1986).

And as the Oregon Supreme Court explained, in a lengthy opinion surveying the Anglo-American history of "right of remedy" clauses in Magna Carta and state constitutional "open courts" provisions:

> [W]hen the Oregon Constitutional Convention convened in 1857, courts and commentators had provided considerable insight into the background and meaning of remedy clauses in state declarations or bills of rights. Those cases and commentaries revealed that the purpose of remedy clauses was to protect "absolute" common-law rights. For injuries to those rights, the remedial side of the common law had provided causes of action that were intended to restore right or justice. Remedy clauses mandated the continued availability of remedy for injury to absolute rights. The requirement that remedy be by due course or due process of law was intended as a limitation on the legislature's authority when it substituted statutory remedies for common-law remedies. It was the duty of courts to enforce those restraints in evaluating whether particular statutory remedies satisfied the requirement that remedy be by "due course of law."

Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 350 (Or. 2001) (citations omitted).

remedy by due course of law, and right and justice administered without sale, denial, or delay").[7]

Whatever the references to "remedy" in other states' "open courts" provisions mean – and they do not universally prohibit statutory restrictions and conditions on the right to bring lawsuits[8] – Washington's constitution does not include such a reference. The omission of a reference to a "remedy" cannot have been inadvertent, and certainly does not signify the existence of a right to a remedy that cannot be conditioned on providing a health care provider with a 90-day notice of intent to commence a medical malpractice action.

Should the Court reach WSAJF's art. I, § 12 "privileges and immunities" argument, it should reject the underlying premise of that argument and hold that there is no "right to a remedy for a wrong

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[7] Section XVII of the Maryland Declaration of Rights of 1776 provided: "That every freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, fully without any denial, and speedily without delay, according to the law of the land." *See Smothers*, 332 Or. at 104 n.12 (citing authorities). Maryland retained the wording of its remedy clause in its constitutions of 1851, 1864, and 1867. *Id.* at 105 n.13. Article I, § 12 of the state constitution that Indiana adopted in 1851 provided that "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." *Id.* at 107.

[8] *See Roelle v. Griffin*, 651 P.2d 147 (Or. Ct. App. 1982) (statute providing that builder could not file lien or sue for compensation or breach of contract unless builder had been registered at time he bid or entered into contract to perform work held not to unconstitutionally deny builder a remedy).

suffered," in art. I, § 10 or any other provision of the Washington constitution.

2. Even if WSAJF's art. I, § 12 "privileges and immunities" argument based on *Grant County II* is considered on its merits, it fails because RCW 7.70.100 does not grant a special "privilege" or "immunity" to health care providers.

The WSAJF's contention that RCW 7.70.100(1) violates art. I, § 12 is overwrought and reads *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) ("*Grant County II*") much more broadly than that decision or the Court's subsequent jurisprudence permits, as if *Grant County II* overruled, *sub silentio*, all prior art. I, § 12 decisions and tests for evaluating the constitutionality of statutes under it.

Art. I, § 12 prohibits "granting . . . privileges or immunities" to a citizen or class of citizens "which upon the same terms shall not equally belong to all citizens." It is concerned both with "avoiding favoritism" and (along with the federal equal protection clause) with "preventing discrimination." *Grant County II*, 150 Wn.2d at 808; *Am. Legion Post #149 v. Wash. State Dept. of Health*, 164 Wn.2d 570, 606, 192 P.3d 306 (2008). "A privilege is not necessarily created every time a statute allows a particular group to do or obtain something," *Am. Legion*, 164 Wn.2d at 606-07, and "not every statute authorizing a particular class to do or obtain

something involves a 'privilege' subject to article I, section 12." *Grant County II*, 150 Wn.2d at 812.

RCW 7.70.100 does not "grant" a "privilege" or an "immunity" to health care providers.[9] A "'privilege' normally relates to an exemption from a regulatory law that has the effect of benefiting certain businesses at the expense of others." *Am. Legion*, 164 Wn.2d at 607. RCW 7.70.100 has not exempted health care providers from anything, much less at the expense of other health care providers. The notice of intent requirement is not about "favoritism" toward health care providers, or about giving a "privilege" to health care providers, *see Grant County II*, 150 Wn.2d at 809, to the "detriment of the interests of all citizens," *id.* at 806-07; the statute's purpose is to advance a interest common to everyone in the state and to the State itself: discouraging upward pressure on the cost of health care. The vast majority of citizens, no doubt including many malpractice claimants and even some plaintiffs' lawyers, consider that purpose legitimate, beneficial and urgent.[10]

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[9] *See McGuire v. Univ. of Utah Med. Ctr.*, 603 P.2d 786 (Utah 1979) (similar notice of intent statute does not violate Utah constitution's prohibition against "special" laws).

[10] The WSAJF apparently is untroubled by the fact that WSTLA joined with *amici* WSMA and Physicians Insurance in *supporting* the medical malpractice reform package of which RCW 7.70.100 is a part. *Senate Bill Report 2SHB 2292*, p. 7.

Even if the right to bring a lawsuit to try to prove a right to recover damages for personal injuries is a "fundamental" right that would bring protections of art. I, § 12 into play, (1) RCW 7.70.100 neither precludes assertion of the right nor immunizes health care providers from liability on a properly prosecuted and duly proven personal injury claim, and (2) that does not mean there also is a fundamental right not to have to give notice of intent to sue a health care provider and wait 90 days after giving notice before actually filing suit. Any burden the statute imposes on the prosecution of health care injury claims is trivial compared to others with which a medical malpractice claimant must comply in order to prove his or her case and obtain a remedy, such as the obligation to present competent medical opinion testimony to prove a violation of the applicable standard of care and causation. *See, e.g., Berger v. Sonneland*, 144 Wn.2d 91, 110, 26 P.3d 257 (2001) ("Expert testimony will generally be necessary to establish the standard of care and most elements of causation" in a medical malpractice lawsuit).[11] If RCW 7.70.100 violates art. I, § 12 under WSAJF's proposed interpretation of *Grant County II*, so

[11] *See also* RCW 4.24.290 ("In any civil action for damages based on professional negligence against . . . a physician . . . the plaintiff in order to prevail shall be required to prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care, and learning possessed at that time by other persons in the same profession, and that as a proximate result of such failure the plaintiff suffered damages").

would every other court rule or statute that imposes a requirement that, if not complied with, would prevent recovery on a health care injury claim.

Moreover, if WSAJF's proposed interpretation of *Grant County II* is adopted, the presumption that a statute is constitutional will be vitiated. There will no longer be such a thing as minimal or rational-relationship scrutiny for art. I, § 12 purposes (even though the Supreme Court has applied such scrutiny post-*Grant County II*. *See State v. Harner*, 153 Wn.2d 228, 103 P.3d 738 (2004)). Statutory classifications affecting personal injury claims will be struck down regardless of whether there is "any conceivable set of facts that could provide a rational basis for the classification." *Medina*, 147 Wn.2d at 313; *Tunstall v. Bergeson*, 141 Wn.2d 201, 226, 5 P.3d 691 (2000). The legislature will no longer be able to enact statutes based on "rational speculation" rather than on empirical evidence. *Andersen*, 158 Wn.2d at 31. Courts will not longer need to respect, but will be able to reject out of hand, a legislative determination that "there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Amunrud*, 124 Wn. App. at 888. It will no longer be irrelevant that that a "better" legislative solution could have been devised, *Wash. Ass'n of Child Care Agencies*, 34 Wn. App. at 234, because the legislature will no longer

be able to *devise* solutions that have any potential negative impact on the successful prosecution of a private damages lawsuit.

The notice of intent requirement and 90-day waiting period of RCW 7.70.100(1) may be considered a nuisance by a plaintiff's lawyer impatient to serve process, propound written discovery, and start interrogating at depositions, but it imposes a modest delay on the opportunity to display forensic skill and zeal while also (a) providing at least the opportunity for settling the claim without litigation; (b) preserving the claim against expiration of the statute of limitations (by extending the limitations period for 90 days plus five extra days when the notice is provided within 90 days of the expiration of the statute of limitations), and (c) encouraging settlement of the claim so *all citizens* will benefit if settlement helps to hold down increases in the cost of health care, a substantial amount of which the State pays. The statute is not one that implicates our state constitution's prohibition against the legislative granting of "privileges" or "immunities."

C. This Court's Recent Decision in *Putman* Does Not Render RCW 7.70.100(1) Unconstitutional.

This Court's recent decision in *Putman*, 216 P.3d 374, should have no bearing on the decision of this case, not only because Ms. Waples did not make arguments of the kind Ms. Putman made, but also because the

notice of intent statute being challenged here is different from the certificate of merit statute struck down in *Putman*. The notice of intent requirement in RCW 7.70.100(1) does not infringe on the information-gathering right of "extensive discovery" that the court in *Putman*, 216 P.3d at 276, found the certificate of merit requirement of RCW 7.70.150 infringed upon, and RCW 7.70.100 thus does not "deny access" to the courts. *See Neal v. Oakwood Hosp. Corp.*, 575 N.W.2d 68 (Mich. Ct. App. 1998) (upholding statute requiring 182 days' prior notice of intent to file medical malpractice lawsuit against equal protection challenge under rational-basis test, and rejecting "fundamental right of access to the courts" argument, explaining that the statute "does not bar medical malpractice plaintiffs from access to the court system, but merely provides a temporal restriction before suit may be commenced") As the court in *Thomas v. Warden*, 999 So.2d 842, 846 (Miss. 2009), explained in holding a similar notice of intent statute constitutional:

> There is no absolute right of access to the courts. All that is required is a *reasonable* right of access to the courts – a reasonable opportunity to be heard [citations omitted]. . . . While the right under our state and federal constitutions to access to our courts is a matter beyond debate, this right is coupled with responsibility, including the responsibility to comply with legislative enactments, rules, and judicial decisions. While the plaintiff in today's case had the constitutional right to seek redress in our state courts . . ., she likewise had the responsibility to comply with the applicable rules and statutes. . . ."

Nor does RCW 7.70.100 present separation-of-powers problems, because it does not impose pleading requirements that conflict with ones established by the civil rules. *Putman*, 216 P.3d at 377-79. *See Neal*, 575 N.W.2d at 78 (rejecting separation-of-powers challenge to statute requiring 182 days' prior notice of intent to file medical malpractice lawsuit because statute "does not change the manner in which or how a civil action is commenced in medical malpractice cases[, but rather] imposes a temporal requirement with which a plaintiff must comply before [suing]").

II. CONCLUSION

For the foregoing reasons, RCW 7.70.100(1) passes constitutional muster and the Court of Appeals decision should be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of November, 2009.

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Physicians Insurance A Mutual Company

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2009, I caused a true and correct copy of the foregoing document, "Amicus Curiae Brief of Washington State Medical Association and Physicians Insurance A Mutual Company" to be delivered via U.S. Mail, postage prepaid, to the following counsel of record:

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